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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. TERRELL DWAYNE HALL, Defendant and Appellant.	2d Crim. No. B271632 (Super. Ct. No. 16PT-00081) (San Luis Obispo County)

Terrell Dwayne Hall appeals the trial court's order committing him for treatment as a mentally disordered offender (MDO). (Pen. Code, § 2960 et seq.)[1] He contends, and the People concede, that the evidence is insufficient to sustain the finding that his conviction of first degree robbery (§ 211) is a qualifying offense under the MDO law. We reverse and remand for further proceedings.

[1] All further statutory references are to the Penal Code.

FACTS AND PROCEDURAL HISTORY

In 2012, appellant pled guilty to first degree robbery and was sentenced to three years in state prison.[2] On January 13, 2016, the Board of Parole Hearings determined that appellant met the MDO criteria and sustained the requirement of treatment as a condition of parole. Appellant subsequently petitioned for a hearing and sought appointment of counsel.

Appellant waived his right to a jury trial. Dr. Kevin Perry, a psychologist at Atascadero State Hospital, testified as the prosecution's expert. Dr. Perry interviewed appellant and reviewed his criminal and mental health histories. Appellant suffers from a severe mental disorder, namely a delusional order. Appellant has fixed, persecutory delusions that others are trying to turn him into a woman or a homosexual by poisoning his food or injecting him with chemicals.

Dr. Perry did not offer an opinion on whether appellant's commitment offense qualified him for MDO treatment. Instead, appellant's prison records were received into evidence. Those records confirmed that on November 14, 2012, appellant pled guilty or no contest to first degree robbery (§ 211), but did not describe the facts of the offense. Dr. Perry opined that appellant's severe mental disorder caused or was an aggravating factor in the underlying offense. Appellant told Dr. Perry that he committed the crime, the robbery of a bank, because he needed money to retain an attorney. More

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[2] To determine whether appellant pled guilty or no contest, we obtained a copy of the San Joaquin County Superior Court's minute order, dated November 14, 2012, evidencing entry of the guilty plea. We take judicial notice of the order. (Evid. Code, §§ 452, subd. (d), 459.)

specifically, appellant told other mental health evaluators that he needed the money for an attorney to sue the jail he had just been released from because jail officials were tampering with his food. Thus, Dr. Perry concluded appellant had a "delusional motivation for the crime that he committed." Dr. Perry also opined that (1) appellant's disorder was not in remission; (2) he had received at least 90 days of treatment for the disorder in the year prior to his parole; and (3) he presented a substantial risk of physical harm to others by reason of his disorder.

At the conclusion of the trial, appellant asserted that his robbery conviction did not qualify him for MDO treatment. He noted that the MDO law includes as an enumerated offense "robbery wherein it was charged and proved that the defendant personally used a deadly or dangerous weapon . . . in the commission of that robbery." (§ 2962, subd. (e)(2)(D).) Because there was no evidence that appellant's crime involved the use of a dangerous or deadly weapon, appellant reasoned that the crime could not alternatively be classified as an unenumerated offense involving either the use of force or violence (*id.*, subd. (e)(2)(P)) or an implied threat to use force or violence likely to produce substantial physical harm (*id.*, subd. (e)(2)(Q)). The People countered that robbery necessarily falls under the latter "catchall" provisions of the statute because the use of force or fear is an essential element of the crime. The trial court agreed with the People, found that appellant met all the criteria for MDO treatment, and denied the petition.

DISCUSSION

Appellant contends the evidence is insufficient to support the trial court's finding that his robbery offense involved either the use of force or violence (§ 2962, subd. (e)(2)(P)), or an

express or implied threat to use force likely to produce substantial physical harm (*id.,* subd. (e)(2)(Q)). The People correctly concede the point.

A determination that a defendant requires treatment as an MDO rests on six criteria, set out in section 2962: (1) the defendant has a severe mental disorder; (2) the defendant used force or violence in committing the underlying offense; (3) the defendant had a disorder which caused or was an aggravating factor in committing the offense; (4) the disorder is not in remission or capable of being kept in remission absent treatment; (5) the defendant was treated for the disorder for at least 90 days in the year before being paroled; and (6) because of the disorder, the defendant poses a serious threat of physical harm to other people. (*People v. Clark* (2000) 82 Cal.App.4th 1072, 1075-1076.) "In considering the sufficiency of the evidence to support MDO findings, an appellate court must determine whether, on the whole record, a rational trier of fact could have found that [appellant] is an MDO beyond a reasonable doubt, considering all the evidence in the light which is most favorable to the People, and drawing all inferences the trier could reasonably have made to support the finding. [Citation.]" (*Id.* at p. 1082.)

Here we are concerned exclusively with the second criterion. Specifically, a defendant may be committed as an MDO if he or she was sentenced to prison for an enumerated crime (§ 2962, subd. (e)(2)(A)-(Q)), or an unenumerated crime that involved either the use of force or violence (*id.*, subd. (e)(2)(P)) or an express or implied threat to use force or violence likely to produce substantial physical harm (*id.*, subd. (e)(2)(Q)). Among the enumerated crimes is "robbery wherein it was charged and proved that the defendant personally used a deadly or dangerous

weapon . . . in the commission of that robbery." (*Id.*, subd. (e)(2)(D).) Although appellant was convicted of robbery, it was neither pled nor proven that he used a weapon in committing the crime.

Appellant suggests that by specifying a particular type of robbery as an enumerated offense, the Legislature effectively expressed an intent to otherwise exclude robbery as a qualifying offense under the MDO law. We are not persuaded. The enumerated offenses are simply a nonexhaustive list of crimes that qualify a defendant for MDO treatment. The Legislature added section 2962, subdivision (e)(2)(P)'s catchall provision "to explain that this was not an exclusive list of offenses that would satisfy the violent crimes requirement. [Citation.] By creating new subdivisions for the force or violence requirement of section 2962, the Legislature expanded the list of crimes for MDO status. [Citation.]" (*People v. Stevens* (2015) 62 Cal.4th 325, 337.)

Accordingly, robbery is a qualifying offense under the MDO law, without regard to whether the defendant used a dangerous or deadly weapon, if it is proven that the crime falls under one of the MDO law's two catchall provisions. The trial court in this case concluded that no proof beyond the fact of the conviction was necessary because robbery is defined as the felonious taking of personal property in the possession of another from his person or immediate presence and against his will accomplished by means of force or fear. We disagree. A robbery accomplished by the use of fear cannot be construed as involving an actual use of force or violence, as contemplated in subdivision (e)(2)(P) of section 2962. Although the crime might involve an express or implied threat to use force or violence likely to produce

substantial physical harm (*id.*, subd. (e)(2)(Q)), such a finding cannot be made without resort to the underlying facts. Here, the facts only indicate that appellant committed a bank robbery to obtain money to hire an attorney. As the People concede, this is insufficient to make the requisite showing.

Because the evidence is insufficient to support the finding that appellant's commitment offense of first degree robbery is a qualifying offense under the MDO law, the MDO commitment order must be reversed. The People ask us to remand the matter for a retrial, at the People's election, on the ground that double jeopardy principles do not apply to MDO proceedings. (See *People v. Burroughs* (2005) 131 Cal.App.4th 1401, 1407, fn. 2.) Appellant asserts that relitigation of the issue of whether his commitment offense qualifies him for MDO treatment is barred by the doctrines of res judicata and collateral estoppel. Appellant is incorrect. "The doctrines of res judicata and collateral estoppel prevent a losing party from relitigating causes of action or issues against the prevailing party after a final judgment. [Citation.]" (*City of Santa Paula v. Narula* (2003) 114 Cal.App.4th 485, 490.) Here, the People do not seek to relitigate a claim or issue that either was or could have been raised in a *prior proceeding* that resulted in a final judgment. They seek to relitigate an issue that was raised or could have been raised in the *current proceeding*, which has yet to result in a final judgment. Thus, on remand, the People may relitigate the issue of whether appellant's robbery offense qualifies him for MDO treatment.

DISPOSITION

The judgment (MDO commitment order) is reversed. Assuming the People request a retrial, the matter is remanded to

the trial court for the limited purpose of deciding whether appellant's commitment offense involved force or violence or an express or implied threat thereof, as contemplated in section 2962, subdivision (e)(2)(P) and (e)(2)(Q). In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P. J.

TANGEMAN, J.

Roger T. Picquet, Judge
Superior Court County of San Luis Obispo

Gerald J. Miller, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Michael R. Johnson and Scott A. Taryle, Supervising Deputy Attorneys General, for Plaintiff and Respondent.